

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 570 OF 1999
WITH
CRIMINAL APPEAL NO. 496 OF 1999

CRIMINAL APPEAL NO. 570 OF 1999

1. Abdullah Mehboob Sarguru
R/o of Mumbai.
Currently lodged at Yerwada
Central Jail.
2. Izaz Shabbir Hussain Sayyed
Residing at A-31, 203,
Shriprasad Colony, Nala Sopara,
(East), Dist. Thane and
currently lodged at Yerwada Central
Jail.
3. Mirza Arif Baig alias
Jacky Azam Baig
Residing at 27, Mohmmad Ali
Road, Mochi Chawl, 2nd floor,
R.No.41, Mumbai and currently
lodged at Thane Central Jail.
4. Jahagir Alia Shabuddin
alias Shabu Kalbe Hussain
sheikh, R/o Red Rose
Apartment, 2nd floor, R.No.9,
Opp. Kausa Masjid, Mumbra,
Dist. Thane and currently
lodged at Thane Central Jail.
5. Anwar Abdulla Sarguru
R/o Mumbai and currently
lodged at Yerwada Central Jail.

.. Appellants
(Orig. accused
Nos.1,2,3,4 and
7).

V/s.
The State of Maharashtra.

.. Respondents.

Shri H.H. Ponda Sr.Advocate with Shri Shrish Gupte,
Sr.Advocate with Shri S.V. Marwadi for the appellants.
Mrs. P.H. Kantharia,A.P.P. for the State.

CRIMINAL APPEAL NO.496 of 1999

1. Satish L. Gawte,
R/o Flat No,. 504,
Mahan Palace, near
Lassi Hall,Ulhasnagar,
Thane.

2. Suryaji Sawant (Dead)
Residing at Old Police line,
New Buld. No.C/19,
Thane (W), Thane.

.. Appellants
(Orig.Accused Nos.
5 and 6)

Vs.

The State of Maharashtra.

. Respondent.

Shri Shrish Gupte,Sr. Advocate with Shri B.G. Tangsali
for the appellants.
Mrs. P.H. Kanthari,A.P.P. for the State.

**CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.**

DATE : 27TH OCTOBER, 2004.

ORAL JUDGMENT (PER ANOOP V. MOHTA)

. These appeals are against the judgment and order dated 20th August, 1999, passed by the Sessions Judge, Mumbai, whereby, all the accused have been convicted under section 302 r/w Section 34 of Indian Penal Code (I.P.C.) and Section 120B r/w Section 34 of I.P.C. and also under Section 225 r/w section 34 of I.P.C. They

have been sentenced to suffer imprisonment for life. They have also been imposed with a fine of Rs. 10,000/- each and directed that sentences to run concurrently. Therefore, Criminal Appeal No. 570 of 1999, by accused Nos. 1 to 4 and accused No.7 and Criminal Appeal No. 496 of 1999, by accused No.5 and accused No.6 (now dead), against the common Judgment and Order.

2. **FACTS;-** All these 7 accused were charged under Sections 302, 120B and 225 of I.P.C. along with 8 others, for hatching conspiracy and facilitate to escape, from the legal custody of the police, one Phiroz Abdula Kokani and for that to murder a Police Head Constable Bhalchandra Kardile (hereinafter deceased). The place of occurrence, was near O.P.D. building, opposite Department of radiology, in the compound of Sir J.J.Hospital (hereinafter J.J. Hospital), Byculla, Mumbai-400 008. The said, Phiroj Abudla Kokani was detenuue under Terrorist And Disruptive Activities (Prevention) Act, 1987 (for short TADA Act).

3. On 6/5/1998 at about 12.30 p.m. Police constable (P.W.2), Shivaji Awati, P.S.I., S.L. Gawte

Accused No.5 (for short A 5), deceased Kardile, P.C. Parad, P.C. Sawant, Accused No.6 (for sort A6) and motor driver Mahadik of Van No. MH-12-M-4048 brought Phiroz Kokani and Salim Abdul Razak Beg, for medical treatment to the J.J. Hospital. The said vehicle was parked at J.J. Hospital compound. P.S.I. Gawte (A5) had service revolver, P.C. Parad, H.C. Kardile (the deceased), P.C. Awati had only one carbines.

4. On same day at about 3.45 p.m. the said prisoner along with specific Officers with specified duties were accompanying from Thane Jail to the Hospital, for medical treatment. As per the prosecution firing took place in the place of occurrence and the deceased died, as a bullet hit him.

5. Phiroz Kokani was taken to the 5th floor by P.S.I. Gawte, P.C. Parad and P.C. Shirsat and Salim Beg was taken to Ward No.4 by Awati (P.W.2), the deceased and Sawant (A6). All were moving around for treatment from 12.30 p.m. At about 3 P.M. P.S.I. Gawte (A5) went to ward No.4 and at that time Phiroz Kokani was sitting in prisoner's Van. P.S.I. Gawate

sent Awati (P.W.2) and the deceased for their meals near the van and accordingly, Awati, (P.W.2) and the deceased went. Thereafter, P.C. Parad and Shirsat were sent, as replacement. Phiroz Kokani during this period was in the police van. At that time Awati handed over his Carbine to Shirsath. After some time Sawant (A6) returned from Ward No.4 and around that time Phiroz Kokani wanted to go to toilet to ease himself therefore, Sawant (A6) had removed his handcuffs and took him along with Awati and the deceased to the toilet in the O.P.D. The toilet was found locked, therefore, they came back and were waiting on the road for P.S.I. Gawte. Phiroz Kokani was standing near the door of the van and was surrounded by on three sides by the deceased, Sawant (A6) and Awati (P.W.2).

6. At about 3.45 p.m. a person fired at (the deceased) Kardile and a bullet hit him. The deceased fell down. (P.W.2) Awati, another constable removed the carbine from the neck of the deceased and chased the assailant at gate No.6, who had fired at the deceased and also . Awati P.W. 2, claimed to have seen Phiroz Kokani sitting as a pillion rider on a running

motorcycle and fled away from the spot towards Noor Baug. P.W.2 (Awati), as well as, other constables could not chase those persons, as another person standing near the gate No.6 had also fired on him. As per prosecution's case, all these persons, who had fired escaped, from the scene. A6 did not chase any one. He was only standing near the Van. P.W. 2 (Awati) came back and found the deceased absent from the spot, as he was shifted to Ward No.4 by (Sawant) A6 and Mahadik. After noting all the information, the police machinery had commenced their investigation. The spot panchanama was recorded including of the van and the surrounding area at about 5.45 P.M. They found two pieces of fired shell on the spot. Based on the information gathered from P.W. (Awati). The statement of P.S.I. Salunke, P.W. 10, was recorded by P.W. 16 and was treated as F.I.R. As per the prosecution, they had arrested police officer P.S.I. Gawte (A5) and (A6) Head Constable Sawant, as some incriminating aspects were found in the conduct of these officers. The entire police team was interrogated. P.W 3 another eye witness Sachin whose statement was recorded on 7/5/1998. P.W. 3 was on the scene of occurrence near gate No.6, at the relevant

time, as he had brought his pregnant wife for sonography at Sion, as he is also resident of Sion Mumbai. P.W. 3 had witnessed 4 persons with pistol running from the spot of occurrence through the gate No.6.

7. On 3/6/1998 accused No.1 was arrested by the police. On 14/7/1998 the custody of accused Nos. 2 to 4 were taken from the Railway Police, C.S.T., Mumbai. Accused 5 and 6 were arrested. On 19/8/1998, accused No.7 was also arrested and was transferred from Goregaon Police Station. The Investigating Officer, after due panchanma and formalities, sent the material for the chemical analyser's report. There was no recovery of any arms and or weapons. The necessary reports were received. Dr. Bawiskar examined and submitted the post-mortem of the deceased Exh..... The necessary charges were filed against the accused Nos. 1 to 4 on 25/6/1998 and on 1/8/1998 against accused Nos. 5 and 6. The Charge-sheet was filed against accused No.7 on 9/11/1998. All the accused denied the charges framed against them. The necessary statements were recorded of the accused. The prosecution has examined 16 witnesses.

These witnesses are as under.

P.W. 1 Sanjay Bhimrao Salunke whose statement was recorded under Section 154 Cr.P.C. and treated as F.I.R. and who has assisted P.W. 16 in the investigating of the case.

P.W. 2 Shivaji Bhimaji Awati, who was on duty as Police escort on Prisoner's van at J.J. Hospital on the date of the incident and one of the eye witness to the incident i.e. on 6.5.1998.

P.W. 3 Sachin Sadashiv Marshilkar, eye witness to the incident on 6.5.1998.

P.W. 4 Devkinandan Motiram Bawiskar, Medical Officer on duty who at the relevant time was attached to Central Jail Hospital who has spoken about Phiroz Kokani being referred to J.J. Hospital for his ailment and medical examination on 5.5.1998.

P.W. 5 Dattajirao Shankarrao Ghorpade, who at the relevant time was a Jailor attached to Thane Central Prison who has deposed about the under-trial Phiroz Kokani being relieved from the jail to proceed under escort to J.J. Hospital.

P.W. 6 Kashinath Pandurang Gurav who was in charge of the armoury at the relevant time . He has spoken about the handing over of handcuffs carbine etc. to the Police personal in this case.

P.W. 7 Mohd. Shabir Ismail Rindani who on the relevant date went to meet the undertrial Phiroz Kokani at J.J. Hospital.

P.W. 8 Pramod Tukaram Patade, SEM who has conducted the identification parade in this case.

P.W.9 Pradip Kalimohan Singhi, acted as panch in this case for scene of offence.

P.W. 10 Arjun Laxman Chavan, who was working as a Clerk in the Thane Central Prison at the relevant time forwarded the under trial Phiroz Kokani to the police escort team for treatment to J.J. Hospital on 6.5.1998 as per the orders of TADA Court, Mumbai. He has deposed about the undertrial Phiroz Kokani not returning to the Jail on that date.

P.W. 11 Madhukar Laxman Salunke who has spoken about the duties assigned to escort party he being the escort in charge.

P.W. 12 Dr. Vithalrao Narayanrao Dabre, R.M.O. of J.J. Hospital.

P.W. 13 Lotal Sakharam Shirsath attached to Thane Police Head Quarters at the relevant time. He escorted the prisoners including Phiroz Kokani on the date of incident i.e. 6.5.1998.

P.W. 14 Shashikant Eknath Shinde, Deputy

Commissioner of Police who was assigned the work of supervision at the Head quarters arranging for escort of prisoners and issued circular.

P.W. 15 Bhujang Shankar Mohite, Commisisoner of Police who has granted sanction to the prosecute- P.S.I. Gawte, and H.C., Sawant accused Nos. 5 and 6-- respectively vide sanction order dated 31.7.1998--

P.W. 16, Mohd Javed Abdul Rashid who was on duty as P.I. at J.J. Marg Police Station on the date of the incident i.e. 6.5.1998.

8. The learned Judge, after considering the entire material on the record, convicted the appellant-accused Nos. 1 to 7, out of 15 accused. Three accused have been reported to be dead and other 5 accused are still absconding. The accused No.6 died pending the appeal. Therefore, appeal against accused No.6 is abated. One Salian @ Dany who was amongst three assailants, also died pending the trial. He was a relevant person to establish prosecution's case.

9. The learned Sessions Judge held that the death of the deceased was due to firing at him, near the police van bearing No. MH 12 W 4048 and near gate No.6, J.J. Hospital, Mumbai. The death of the deceased (Kardile) was homicidal. Accused Nos. 1 to 7 were held responsible for the death of the deceased. It is also held that there was a criminal conspiracy by the present accused and others, and by firing at the deceased a commotion was created and taking advantage thereof, said Phiroz Kokani escaped from legal custody of the police. It has also been held that the entire gamut of the conspiracy was the culmination of meeting of minds to gain the above objectives. It is also held that there was subversion of lawful authority at the time of firing at the deceased, which consequently made Phiroz Kokani to escape. The learned Judge therefore, held that the offences have been committed by each of the accused Nos. 1 to 7 and accordingly, convicted and punished.

10. Heard the learned Sr. Counsels for the appellants and Mrs. P.H. Kantharia, learned A.P.P. for the State. We have been taken through the record of the

proceeding. We have gone through the testimonies of the witnesses and the relevant documents with the assistance of the Counsels appearing for the parties.

11 **REASONING:-** The prosecution story and the conviction in question are mainly based upon the P.W. 2 (Awti), P.W. 3 (Sachin). P.W.2 was a police constable at the relevant time, who had surrounded Phiroz Kokani along with the deceased (Kardile) P.C. Sawant-accused No.6 (now dead) at the relevant time. P.W. 2 has deposed that the deceased (Kardile) got injured, as one Salian (now dead) had fired at him. P.W. 2 has deposed that as the deceased fell down, he removed carbine from his neck and chased that person i.e. Salian @ Dany. P.W. 2 has further deposed that he had chased two persons, one who fired i.e. Salian @ Dany and the prisoner Phiroz Kokani who ran away towards Noor Bag. P.W. 2 after some chase returned as both the persons ran away and escaped. P.W. 2 has nowhere deposed about the other 4 persons, who ran away from the spot. and or even referred to any other accused, who fired the shots if any, except deceased Salian @ Dany. Therefore, as per this witness itself, the deceased (Kardile) had

succumbed to the said bullet injury. The murder was committed only by Salian, (now dead). He has not deposed about any other person or accused. He had identified the dead body of Salian @ Danny on 28th June, 1998. On 22/7/1998 he was again called to J.J. Marg, (Morgue) to identify another dead body. This witness had identified accused Nos. 2 and 4 in the Court. There was no reference made about the specific role played by these accused and specially of A2 to A4. There was no reference made of accused No. 1 and 7 in his deposition. Therefore, there was no cross-examination by accused Nos. 1 and 7. P.W. 2 was suspended from 29th May, 1998, because of the incident in question. P.W. 2 has also deposed that he had not mentioned about the firing by the said Salian at him. This witness has nowhere supported the prosecution case beyond identifying the role played by Salian, who had fired and killed the deceased. Even though this witness had identified the accused No.5, 6, 2 and 4 in identification parade, it nowhere connects the offence as alleged by the prosecution against all the appellants accused Nos. 1 to 7, as he had positively deposed and identified the person who had killed the deceased.

There are no other corroborating witnesses to this, except P.W.3, even as per the prosecution case.

12. P.W. 3, who had been to J.J. Hospital for Sonography of his pregenant wife, and was about to enter gate No.6, he heard pistol shots. This wintess had also identified the dead body of assailant of the deceased on 20th June, 1998. This witness has also in the identification parade on 22/7/1998, identified the accused Nos. 2 and 4. We have gone through this testimony of P.W. 3 and we find that this witness is full of contradictions and therefore, unreliable. There is no proof on the record to show about their visit to J.J. Hospital. He was in the hospital upto 6 p.m. on that day. But his statement was recorded on 7/5/1998. There was no reference also about motorcycle on which P.W.2 chased the assailants. P.W. 3 has deposed that he had heard pistol shots, when he was entering the gate No.6 of the Hospital, at about 3.40 to 3.45 p.m. He saw three persons holding pistols running towards him. He also saw a constable lying injured. Those three persons when reached near gate No.6, halted for a moment and again fired at constable. This witness has deposed that

the deceased (Kardile) was lying injured when constable P.W. 2 had removed carbine from the neck of the deceased and went towards the assailants. This witness has further deposed that he saw P.W. 2 chasing two persons armed with pistols who were riding on motorcycle. This witness had also chased them for some distance. The said motorcycle went towards Dongri. P.W. 3 has deposed that P.W. 2 stopped one motorcycle and rode towards the assailants. This witness came into picture, after the injury of the deceased and when Salian and Phiroz Kokani were running away. There was no case of the prosecution or even of P.W. 2 that Phiroz had a pistol in his hand. There is no material to show that this witness had allowed the assailant and Phiroz to escape and then chased them. If this witness, was on the spot at the relevant time he saw P.W. 2 chasing these two persons. There is no mention about the role of accused No. 2 and 4 at this stage on the spot of occurrence. It means only two person fled away on motorcycle, as there was no reference about three persons on the motorcycle by P.W. 2, although P.W.3 has deposed that he saw accused no. 2 (Ijjaz), who was driving the motorcycle on which two persons escaped.

13. P.W. 3's statement was recorded by the police. This witness has identified accused No.2, driver of the motorcycle, and the second person i.e. accused NO.4 who was talking with with the accused No.2. It is not clear when and where they were talking to each other. There is clear contradictions in between P.W. 2 and P.W.3 in reference to the no. of persons, who were running towards him and rode on the motorcycle. P.W. 2 has deposed that he had chased assailant Salian and Phiroz who rode on the motorcycle and fled away. The prosecution and P.W.2's case was that Phiroz with unknown persons fled away on motorcycle. There is contradiction between P.W.2 and P.W. 3 also. This P.W. 3 has deposed that he heard voice of injured constable and thereafter, they took the deceased to the casualty department. On 22/7/1998, he identified accused Nos. 2 and 4 in the identification, parade. This P.W. 3 in his cross-examination has has been unable to explain the absence of the reference of motorcycle in his police statement. He has also been unable to explain, why he could not tell to the police that P.W. 2 had stopped the motorcycle and rode over to chase the assailants and

said Phiroz Abdula. This witness has further deposed that there was no much traffic on that road. His pregenent wife during this time was in a nereby hotel. His wife was not examined.

14. There are various contradictions and improvements in the evidence of P.W. 3 in reference to the evidence of P.W.2. As per P.W. 3 there were three persons who fired at the deceased and injured him and thereafter four persons ran out of the gate No.6 and not only two as deposed by P.W. 3. There is no reference made to what happened to other absconding 2 persons. P.W. 2 (Awati) has nowhere deposed that he chased those assailants by a motorcycle upto Noor Baug, but could not succeed in arresting them. P.W. 3 has further deposed that P.W 2 (Awati) while chasing on the road stopped the motorcycle and rode on in and chased the two assailants. There are discrepancies in reference to the details of alleged accused or assailants as given by P.W. 2 and P.W. 3. Therefore, it is P.W. 3, who had given specific role only to accused Nos. 2 and 4, and not to any other, who along with other accused alleged to had hatched conspiracy and helped Phiroz Kokani to escape.

The prosecution has attempted to connect all these accused 1 to 7 and specially accused Nos. 2 and 4 with the crime in question based on the evidence of these two witnesses. P.W. 2 as noted above has nowhere attributed any role to these accused specially of accused Nos. 2 and 4 in his testimony connecting them with firing at the deceased and or at him. There are no other testimonies or witnesses to support the positive case and or evidence against the accused Nos. 2 and 4. The identification by P.W. 2 and P.W. 3 of accused Nos. 2 and 4 in the identification parade after one and half months, itself cannot be sufficient foundation to convict the accused under section 302 r/w section 120B, as done in the present case. We have also noted that P.W. 2 has no where mentioned any thing about Phiroz Kokani, when he ran out of the gate No.6. P.W. 3 has also been unable to connect the manner in which accused No.2 or 4 helped Phiroz Kokani to escape on motorcycle and further that person who sat on the pillion of motorcycle with gun was Phiroz Kokani and no one else. No other corroborating evidence, including of motorcyclist and motorcycle number, except the statement made in F.I.R. Exh.40. It is clear that such statement

made in the F.I.R. cannot be treated as substantial piece of evidence, unless it is corroborated by other independent witnesses or any other cogent material to support the same. Therefore, the evidence of P.W.2 (Awati) read with the evinces of P.W. 3 are not sufficient to link the offence, as charged against all the accused. These evidences are not sufficient to involve all the accused in the crime in question beyond reasonable doubt.

15. Even if we take the testimony of P.W. 2, as substantial and material evidence to support the prosecution case, we find that, as per the prosecution case itself, the person, who had killed the deceased was the deceased Salian. P.W 2 and 3 had identified the dead bodies of the said deceased Salian @ Dany with other. Therefore, Salian @ Danny had murdered the deceased and no one else. Therefore, it is difficult to sustain the conviction, as well as, impugned order, as passed by the learned Sessions Judge against all the accused in view of this evidence itself.

16. **THE CONSPIRACY:-** What remains is the case of the

conspiracy, as contemplated under Section 120A r/w with Section 120 B of I.P.C. There is nothing on the record to establish conspiracy or pre planning by all the accused to facilitate the escape of Phiroj Kokani from the Police custody on that day, in question. As per P.W. 2 deceased Salian and Phiroz Kokani ran away and he chased them, this itself cannot be sufficient to connect the involvement of accused Nos. 2 and or 4. There is no independent or any material circumstance to demonstrate that all the accused had conspired and committed the offence in question.

17. The more important thing in this case is the alleged prosecutions case of conspiracy revolving around Section 120A and 120B of Indian Penal Code. There is no doubt that it is difficult to collect the evidence and to prove the agreement between conspirators. Based on the facts and circumstances of the case, the Court has to draw inference to prove that the particular act or omission falls within the ambit of conspiracy. The material as well as, circumstances should be such as to satisfying the Court that the persons have conspired to commit the offence. Thus it is essential that the main

accused should be connected or involved in such agreements of minds along with other co-conspirators, either directly or indirectly. Therefore, the burden is always heavy on the prosecution to bring on the record, the material to connect, a conspirator with the crime or offence in question. Section 10 of the Indian Evidence Act, 1872 will also come into play in such matters. Prima facie therefore, the mode of proof of the offence of conspiracy also needs the same evidence and material to prove the concerned offence. In absence of any direct evidence and in the facts and circumstances of such case, conspirator's design and intention to commit illegal act has to be inferred. There is necessity of proving the common intention by the conspirators and between the conspirators. There must be connection of act or omission as a part of such conspiracy.

18. In the present case therefore, even if we assume some negligence on the part of the police officers, as they failed to take care of the particular prisoner, at the relevant time, that itself cannot be the foundation to connect all these police officers along with the accused with the crime in question on the foundation of

section 120A and 120B of I.P.C.

19. There is evidence on record through P.W.14 by which it has been brought on the record that the police officers were fully aware of their responsibilities and or should be aware of their responsibilities while taking or transporting any prisoner from one place to another. The said guide lines has been placed on the record through the evidence of prosecution witnesses. Therefore, even if there were some breaches of their duties or guide-lines, still it is difficult to accept the prosecution case that all the police officers were involved in this particular crime, as it amounts to "conspiracy", as contemplated under Section 120A and 120B of I.P.C.

20. In the present case, there is no doubt and as observed even by the learned Sessions Judge that the prosecution has failed to place on the record any material and or evidence to bring on the record any meeting of minds and or any agreement by the accused prior to the date of incident i.e. 6/5/1998. In the absence of proof of any other act or intention of any

conspirators, prior to the date of meeting and or incident and as the prosecution has failed to prove and or bring any thing on record to connect their agreement or meeting of minds prior to 6/5/1998 or even thereafter. It is difficult to accept the prosecution case, as well as, the reasoning given by the learned Judge, that there was conspiracy hatched by these accused to commit the crime in question, with the help of each other.

21. The conspiracy in the present case as alleged and as observed by the learned Judge, is therefore, based on surmises and conjunctures. The inference can be drawn of conspiracy and or of common intention to commit such act, only if any material or connecting evidence brought on the record, concerning and or connecting the respective conspirators or accused. In the present case according to us all these things are missing. There are no circumstantial evidence to connect all these accused with the crime in question on the foundation of conspiracy. We are concerned with the direct or indirect proof of conspiracy by all the accused, to connect the crime with the accused.

22. The alleged conspiracy by the police officers as observed by the learned Judge is incorrect. It is difficult to accept that they had hatched conspiracy at the cost of life of the deceased.

23. The deceased (Kardile) was also a police officers at the relevant time who had cordoned Phiroz Kokani along with others at the relevant time. There is no material placed on the record by the prosecution that they had plan or an intention to kill the deceased through the assailant-deceased- Salian. It is clear on the record that assailant Salian had fired the shot at the deceased and not on any one else. The involvement of these officers therefore, in this crime according to us is not proved beyond reasonable doubt, for want of either direct or indirect proof of conspiracy.

24. The evidence of P.W. 7 has been made the foundation against all the accused that he saw a boy talking to Phiroz Kokani in the Mazgaon Court and later on the said P.W. 7 was also present at J.J. Hospital to meet Tanwir and Phiroz Kokani. Merely because the

said boy was talking with Phiiroz Kokani, as also deposed by P.W. 13, and the family members of Salim, also arrived at the said Hospital and came near prisoners van and handed over tiffin after inspection by the accused NO.5, that itself cannot be sufficient to held that P.W 13 or P.W.7 have proved beyond reasonable doubt of conspiracy by the police officers also. Accused No.5 had allowed the tiffin to be kept in the prisoners van for the Salim Beg that itself cannot be sufficient to accept the prosecution case against the accused.

25. P.W. 7, Mohmad Shabir had identified accused No.1 and deposed that he saw Abdullah (Accused No.1) (A1) at Mazgaon Court. There is no corroborative evidence to support the testimony of this witness. This witness has admitted that he had not told any thing to the police at the time of his statement. which is reproduced as under:-

I come out, stood at distance and heard the conversation between Abdul Sadguru and another to the effect "Firoz Abhi J.J. hospital me aaya

hai. Hamne baki ki puri tayari kiyeli hai, tu jake usko ye bata de, aur jo time apnane pakka kiya hai woh bhi bol de." I had not told the police to the aforesaid effect at the time of my statement. I cannot explain how it is so recorded."

26. The learned A.P.P. has also relied on evidence of P.W. 1 to support its case to justify the conspiracy by all these accused. P.W. 1 Sanjay Salunke, has deposed that after receipt of the information he rushed towards the spot and proceeded further to investigation into the matter. Therefore, this witness has no direct knowledge of the incident in question. This witness has admitted that the statement of P.W.2 (Awati). was not recorded as F.I.R.. This witness has also deposed that the accused were made to stand near the railway gate and the police persons cordoned them on that spot during the process of the identification parade.

27. It is also difficult to accept that merely because Firoz Kokani at 3.30 P.M. requested the accused No.5 to take him to the Lavatory and as lavatory was

closed, this incident was a part of the alleged conspiracy. The conspiracy can also be proved by circumstantial evidence but according to us in the present case both these elements are missing. The incident as referred above nowhere supports pre planning or meeting of minds or agreement of minds of these officers with others to allow the prisoner to rescue from their custody.

28. It is not unnatural that when a handcuffed accused wants to go to lavatory or toilet, his handcuffs are required to be removed. The possibility of pre planning and discussion, unless proved beyond reasonable doubt, could not match the prosecution case that every thing was pre planned by all the accused as alleged and therefore, accordingly the prisoners were brought into the hospital at 12.00 p.m. and kept waiting upto 3.45.

29. The deceased was injured who had carbine in his neck and no other accused or police officers had carbine at the relevant time. The deceased was shot dead and in that situation merely because accused No.6 (now dead)

could not control Firoz Kokani, who escaped from that spot, that itself cannot be the reason to accept the prosecutions case of conspiracy against these accused. The panic some time make such situation mentally and physically uncontrollable. The standby person in such cases of firing is likely to save his own life first. P.W. 2 in fact took carbine from the neck of Kardile and had chased assailants. What accused No.6, could have done to prevent the escape of prisoner cannot be suggested now. P.W. 3 Shirsat has deposed that Sawant was frightened and came to us and informed accordingly. Even if there is some negligence till it cannot be said to be a case of criminal conspiracy, as alleged, against the accused in the present case.

30. Therefore, in absence of positive proof of conspiracy and in facts and circumstances of the case we do not agree with the findings given by the learned Sessions Judge, including the conviction order against the appellants under Section 302, 120B and 225 of I.P.C.

31. There are no ingredients of Section 225 of I.P.C., present in the present case. There is no

material to support on the record that the accused-police officials had deliberately or intentionally facilitated, Phiroz to escape from police custody. On the contrary there is evidence to show that they tried and chased those persons to arrest them, but they could not arrest them, in spite of their efforts. There is material on record that all these officials at the relevant time had surrounded Phiroz before the incident in question. They were in the premises since 12.30 p.m. Therefore, for want of specific material against these accused in the facts and circumstances of the case, we are not accepting the case of the prosecution that the police officers have committed the offence under Section 225 of I.P.C., even if we assume for a moment that there was some negligent, as they failed to take care of the prisoner as per the guidelines provided in such situation, if any, still it cannot be said this act itself falls within the ambit of Section 225 of I.P.C. At least in the present case. We are not concerned with the departmental action or enquiry, if case is made out.

32. There is no doubt that the police officers

should take care of their responsibilities as per guidelines prescribed for such situation. Therefore, such negligence, if any, are unaffordable to the department, as well as, to the society. However, in the present case, based on the material placed on the record, we are of the view that the prosecution has failed to prove beyond reasonable doubt that all the accused had hatched the conspiracy and with common intention committed the murder of Kardile and facilitate Phiroz Kokani to escape from legal custody.

33. The prosecution is unable to explain the delay of more than 24 hours in lodging the F.I.R. In such matters the delay of lodging and recording F.I.R. after 24 hours of the incident also raises doubt in the prosecution case. The presence of P.W. 3 at the relevant time on the scene is also appears to be doubtful. Being the resident of Sion, instead of treating his pregnant wife at Sion, hospital, he had visited J.J. Hospital, Byculla. No evidence of pregnant wife of P.W. 3 was lead to support the case of P.W. 3 to confirm about his presence at the relevant time.

34. There is no much dispute about the handling over of arms and ammunitions and handcuffs; about the homicidal death of the deceased; about the presence of police officers and two prisoners in the J.J. hospital, at the relevant time, as the same has been duly proved by P.W. 4,5,6,7,10. But this itself not sufficient to accept the prosecution case.

35. There is nothing on the record to show that while conducting the identification parade all the necessary guide lines have been followed.

36. P.W. 4 Dr.Devkinandan Motiram Bawiskar in his post-mortem report has established and proved only about one basic bullet injury. This witness had only proved the treatment to Firoz Kokani and therefore, he was brought to the J.J.Hospital.

37. P.W. 8 Pramod Patade, has also nowhere supported the prosecution case fully. Identification parade was not conducted as per the prescribed guide-lines.

38. P.W. 9 Pradip Singh, was the panch witness and has deposed that two shell's of bullets were recovered from the spot. It was recorded at 5.45 p.m. on the same day. P.W. 15 was the Commissioner of Police, who had sanctioned the action against the appellants-accused 5 and 6.

39. P.W 16 the Investigating Officer has proved the various documents on the record, including the post mortem of Kardile and chemical analyser's report. There were various contradictions in his testimony in reference to other testimonies of the prosecution witness.

40. The cumulative effect of these testimonies is that the prosecution has failed to prove beyond reasonable doubt that the accused have committed the offence in question. The learned Judge has therefore, wrong in convicting all the accused based on the evidence of these testimonies as same nowhere supports

the prosecution case fully, against all the accused, under section 302 r/w section 120B and or 225 of I.P.C. The learned Judge has overlooked the case of defence completely and wrongly relied upon the prosecution case. Therefore, impugned Judgment and order is quashed and set aside.

41. For the reasons recorded above, both the appeals are allowed. All the accused are acquitted they be released forthwith, if not needed, in any other offence.

[V.G.PALSHIKAR]

[ANOOP V. MOHTA, J.]